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In the

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of COSMO A. DALOIA, *Appellant*, v. B. J. RHAY, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee.*	No. 15636

APPEAL FROM THE UNITED STATES DISTRICT COURT

For the Eastern District of Washington
SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, Cosmo A. Daloia, was charged n the King County superior court with the crime f second degree assault. Following a trial to a jury nd pursuant to a finding of guilty, the appellant, n the 10th day of June, 1955, was adjudged guilty f the crime charged and sentenced to a term of not

more than ten years in the state penitentiary at Walla Walla, Washington. Subsequently, the petitioner attempted to have habeas corpus issue from the supreme court of the State of Washington. That petition was denied on October 19, 1956. Appellant then petitioned the supreme court of the United States for a writ of certiorari, which writ was denied on February 26, 1957. Following this denial, a petition was addressed to the district court of the United States for the eastern district of Washington, southern division, for a writ of habeas corpus. This petition was denied by Judge Driver on May 29, 1957, from which order this appeal was taken.

STATEMENT OF QUESTIONS INVOLVED

The only serious question raised by the appellant's brief is the constitutionality of the alternative punishment provision of the Washington statute on assault in the second degree, RCW 9.11.020. The appellee respectfully submits that an initial question is presented, however, of whether the constitutionality of a state criminal statute is at all reviewable in a habeas corpus proceeding before this court.

ARGUMENT

The appellee submits that the constitutional uestion raised by the appellant is not here review-ole under *Whitacre v. Traeger*, 17 F. (2d) 767. hat decision held in effect that the constitutionality a state criminal statute is not reviewable in the nth circuit court in a writ of habeas corpus, but at the petitioner will be left to his remedy of rect proceedings so that the question can ultimately presented to the United States supreme court.

Assuming the constitutional issue properly be-re the court, however, it is readily observed that e appellant's position is based on wholly untenable terpretations of both Washington statutes and the se of *In re Olsen v. Delmore*, 48 Wn. (2d) 545. he criminal statute under which the appellant was nvicted, RCW 9.11.020, contains the following ovision as to punishment:

> "Shall be guilty of assault in the second degree and be punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both."

These words should be compared with those RCW 9.41.160 which the court condemned as nconstitutional in *In re Olsen v. Delmore, supra,* follows:

> " 'A violation of any preceding provisions

> of this chapter is punishable by a fine of not more than five hundred dollars or imprisonment in the county jail for not more than one year or both, *or* by imprisonment in the penitentiary for not less than one year nor more than ten years.' (Italics ours.)"

Penalty provisions, such as the one found in our second degree assault statute, are readily distinguished therefrom as was pointed out by *In re Olsen v. Delmore, supra,* at page 548, as follows:

> "In our view, however, the penalty statutes to which reference has just been made are substantially different in form and structure from the penalty section of the uniform firearms act (RCW 9.41.160). In the latter section, unlike the others, the provisions for a fine or county jail sentence are linked together with the words 'or both,' after which, and separated by another conjunctive 'or,' the provision for penitentiary punishment is set out. This seems to be a pretty clear indication that the legislature thereby intended to vest in prosecuting officials the discretion to charge as for either a gross misdemeanor or a felony."

By these words, the court has clearly shown its intention to restrict its finding of unconstitutionality to the particular statute in question, i.e., the uniform firearms act. The appellant's interpretation would stretch this opinion out beyond its obvious import and plain language.

Finally, that this crime of second degree assault is a felony and punished as such is clear. RCW 9.95-

010 absolutely requires that one convicted of a crime be sentenced for the maximum term therefor provided. RCW 9.01.020 provides that every crime which may be punished by imprisonment in the state penitentiary, as is the case here, is a felony. The appellant's theory that one convicted of second degree assault might be sentenced as for a misdemeanor is completely untenable in the light of these statutes.

CONCLUSION

The constitutionality question here raised as to this assault statute does not appear to the appellee to be properly before this court. But, if the matter be considered, it is submitted that the Washington statute cited can only be read as requiring that one convicted of second degree assault be sentenced as for a felony, i.e., ten years' imprisonment in the state penitentiary. Therefore, the appellee can only urge that the order of the district court denying the application for habeas corpus be affirmed.

Respectfully submitted,

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